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## In Defense of the Boland Amendment

As the facts have come out about the Reagan administration's secret direction of the Contra war and its lies on the subject to Congress and the public, the administration's defenders have gone on the attack. Their target is the main law at issue: the Boland amendment, which, in various forms, restricted U.S. government aid to the Contras from 1982 to 1986.

The indictment against the Boland amendment has four counts. First, it was a silly law, impossible to parse, with vague, inconsistent and fluctuating requirements. Second, the administration did not violate the law. Third, the Boland amendment was

ated sympathy for Assistant Secretary of State Elliott Abrams, forced to struggle with "trivial legalities" such as whether wristwatches constitute lethal or humanitarian aid. But this "humanitarian" dodge was also a fiction created by the administration and blackmailed through Congress. Who can refuse "humanitarian" aid? There were no complaints about fluctuation or inconsistency when, last year, Congress reversed course and approved straightforward military assistance.

There was nothing obscure or hard to fathom about Congress's intent during the main Boland amendment years, 1984-86. As Mr. Abrams's predecessor, Langhorne Motley, testified at the time, the restriction was written in "pretty plain English": No money should be spent "directly or indirectly" promoting the Contra war. The message was: Just stop. That is not complicated, and it is not "micro-management." The pettifoggery is all the after-the-fact work of administration apologists.

The Boland restriction applied to "any agency . . . involved in intelligence activities." The administration now argues that the NSC is not an intelligence agency, and therefore McFarlane, Poindexter, North and company were exempt. In its notorious legal memorandum on this subject, the President's Intelligence Oversight Board cited copious evidence that the NSC is officially "a coordinating body with no operational role." Sure that's what it's supposed to be, but that's not what it secretly became under Mr. Reagan. Under Mr. Reagan it was "involved in intelligence activities." That's the whole point. Anyway, for the president of the U.S. to play cat-and-mouse with the obvious intent of legislation he himself signed is contemptible.

Equally obvious, the law was not intended to allow the administration to strong-arm allies into paying for the Contras, or to direct a war it was not funding. Rep. Edward Boland may have contemplated private fund raising, but not fund

raising and detailed planning by government officials. He said in the debate that the prohibition applied to "salaries and all support costs." The purpose was not to save money. It was to use Congress's power of the purse to stop the war.

And thus to the constitutional objection. Was Congress overreaching? The Constitution allots certain explicit powers to Congress and certain explicit powers to the president. In other areas, the division of authority is murky. But as the leading explanation of this issue—Justice Jackson's concurring opinion in the 1952 Steel Seizure case—makes clear, it stands to reason that the president's power to act unilaterally is at a minimum when the law explicitly forbids the action he wishes to take.

The president has more powers in foreign than in domestic affairs. But it is not cheating for Congress to use its appropriations power to dictate foreign policy. James Madison himself, writing about Congress's power to declare war, described it as "one effectual check to the Dog of war" precisely because it transferred the decision "from those who are to spend to those who are to pay."

There are limits, of course. It may be that no law can prevent the president from talking to King Fahd or the president of Honduras, though it is fanciful to assert (as the Journal has) that any such conversation was Mr. Reagan's First Amendment right. There is no First Amendment right to say, "I'll pay you \$5,000 to kill my wife," and there is no First Amendment right to knowingly further a conspiracy by others in violation of the Boland amendment, even if that amendment doesn't apply to you personally. If we're looking for extraneous constitutional provisions to throw into the stew, how about the one forbidding any federal office holder "without the Consent of the Congress, [to] accept of any present . . . of any kind whatever, from any King, Prince, or foreign State"?

If the Boland amendment is "patently unconstitutional," as the Journal insists, then the only constraint on the president's power to make foreign policy is Congress's right to declare war—itsself badly eroded in recent decades. Short of sending masses of American troops for extended periods of time, and provided he is willing to finance his ventures by blackmailing allies or selling off the interstate highway system rather than through appropriations, the president can run wars all over the world and the people's only recourse is to wait until the next election. (He couldn't even be impeached, since he would have committed no crime.)

At the very least, this is an exercise in constitutional activism that makes the court-rulings of the Warren era—so often denounced by conservatives—seem like the strictest of strict constructionism.

"Mr. Reagan . . . should have challenged the Boland amendments when they occurred," says the Journal, in an off-heard sentiment these days. What a fantasy! Nothing better illustrates the fraud of current arguments against the Boland amendment than to imagine what would have happened if the administration had made these arguments at the time. Not much imagination is needed. If Mr. Reagan had announced that he interpreted the restrictions as not applying to the NSC, the law would have been rewritten within five minutes. If he had asserted a constitutional right to finance and direct the Contra war no matter what Congress thought, he would have plunged the nation into a constitutional crisis. In either case, he would have created a political catastrophe for himself and his party.

So instead, he signed the legislation and claimed to be obeying it, while flouting it in secret. Then he got caught. Sorry, it's too late to cry foul.

Mr. Kinsley edits the New Republic.

### Viewpoint

By Michael Kinsley

an unconstitutional infringement by Congress on the president's power to make foreign policy. Fourth, the real moral of the Iranamok saga is that a great power can't have "535 secretaries of state" attempting to "micro-manage" its dealings with the world.

It's true that various versions of the Boland amendment contained some conceptual absurdities. But these were inventions of the administration, not of Congress. Ditto the accused "fluctuations." Version one, in 1984, forbade Contra aid only "for the purpose of overthrowing the [Nicaraguan] government." It may seem silly to pretend that the Contras were fighting and dying for any other reason, but that's exactly what the administration did pretend at the time. President Reagan said in 1983 that the U.S. was "not doing anything to try and overthrow the Nicaraguan government." When revelation of the CIA harbor mining and Mr. Reagan's "say uncle" remark exposed this as a fraud, Congress "fluctuated" to tougher restrictions.

This newspaper sheds tears of exasper-

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